Supreme Court, U.S.
FILED
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No. 97-1462

In The

Supreme Court of the United States

October Term, 1997

DOUGLAS E. YEO, Individually and on Behalf of his Children and as Chairman of the Lexington Parents Information Network,

Petitioners,

vs.

TOWN OF LEXINGTON, JEFFREY YOUNG, Superintendent, DAVID WILSON, Principal, SAMUEL KAFRISSEN, KAREN MECHEM and JOSEPH DINI, Chairman, JOHN OBERTEUFFER, LOIS COIT, SUSAN ELBERGER and BARRIE PELTZ, Individually and as they are Members of the Lexington School Committee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER STATEMENT OF THE QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit properly found that the decisions by student editors of a public high school newspaper and yearbook to reject advertisements submitted by a parent do not constitute "state action" where the student editors exercised editorial autonomy and school officials did not participate in or control the students' decisions in any way.

TABLE OF CONTENTS

	Page
Counter Statement of the Question Presented	i
Table of Contents	ii
Table of Authorities	iii
Counter Statement of the Case	1
A. The Yearbook And *Musket* Are Independent Student-Run Publications.	2
B. The Student Editors Of The Yearbook and *Musket* Independently Decide To Reject Yeo's Ads.	3
C. The Student Editors Affirm Their Decisions Not To Print The Ads.	5
Reasons for Denying the Writ	7
I. The First Circuit's *En Banc* Decision Does Not Conflict With This Court's Precedent Or With Any Appellate Decision.	8
A. *Hazelwood Sch. Dist. v. Kuhlmeier* Does Not Apply to the State Action Issue Presented by This Case.	8
B. The First Circuit's *En Banc* Decision Does Not Conflict With *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*	12

Contents

	Page
C. The First Circuit's *En Banc* Decision is Consistent With the Courts of Appeals Decisions That Have Considered State Action in the Context of Student Publications. . .	13
II. This Case Does Not Involve Issues That Are Widespread Or That Are Likely To Recur.	14
III. Petitioner's Claims Are Legally Defective.	16
A. The First Circuit Correctly Held That State Action Did Not Exist.	16
B. The Yearbook's And *Musket's* Advertising Sections Were Not Public Fora.	17
C. Petitioner's Claims Are Futile Since Respondents Are Immune From Suit Under § 1983.	19
Conclusion	19

TABLE OF AUTHORITIES

Cases Cited:

Avins v. Rutgers, State Univ. of New Jersey, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) .	14
Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992)	8

Authorities

Page

Brody by and through Sugzdinis v. Spang, 957 F.2d 1108 (3d Cir. 1992) 8

Brown v. Palmer, 944 F.2d 732 (10th Cir. 1991) 18

Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988) 9

Cornelius v. NAACP Legal Defense and Educ. Fund, Inc., 473 U.S. at 788 (1985) 18

Families Achieving Independence and Respect v. Nebraska Dep't. of Social Serv., 111 F.3d 1408 (8th Cir. 1997) 18

Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) ..... *passim*

Lee v. Board of Regents, 441 F.2d 1257 (7th Cir. 1971) 14

Leeds v. Meltz, 85 F.3d 51 (2d Cir. 1996) 14

Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) 18

Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) .. 16

Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977) 14

Authorities

	Page
Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983)	18
Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir. 1991)	*passim*
Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990)	8, 9
Polk County v. Dodson, 454 U.S. 312 (1982)	17
Rendell-Baker v. Kohn, 641 F.2d 14 (1st Cir. 1981), *aff'd*, 457 U.S. 830 (1982)	11
Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ., 42 F.3d 719 (2d Cir. 1994), *cert. denied*, 515 U.S. 1160 (1995)	8
Sinn v. The Daily Nebraskan, 829 F.2d 662 (8th Cir. 1987)	13

Statutes Cited:

42 U.S.C. § 1983	*passim*
Ark. Stat. Ann. § 6-18-1201-1204	16
Calif. Educ. Code § 48907	16
Colo. Rev. Stat. § 22-1-120	16

Authorities

	Page
Iowa Code § 280.22	16
Kan. Stat. Ann. § 72-1504-72-1506	16
Mass. Gen. L. c.71, § 82	*passim*
Rule Cited:	
Supreme Court Rule 10	15

Respondents Town of Lexington *et al.*[1] hereby oppose the issuance of a writ of certiorari to review the *en banc* decision of the United States Court of Appeals for the First Circuit.

COUNTER STATEMENT OF THE CASE

Granting summary judgment in favor of Respondents, the United States District Court for the District of Massachusetts found that the independent conduct of the student editors of the Lexington High School ("LHS") Yearbook and newspaper (the "*Musket*"), in rejecting advertisements submitted by Petitioner, did not amount to state action. Petitioner's Writ of Certiorari, Appendix A at 1a (hereafter "App."). A panel of the United States Court of Appeals for the First Circuit reversed the District Court in a two-to-one decision. App. B at 21a. Thereafter, sitting *en banc*, the Court of Appeals reversed the panel and affirmed the decision of the District Court. App. C at 105a.

The *en banc* decision to affirm the grant of summary judgment to Respondents was unanimous. Five out of the six judges, including one of the judges who had joined in the majority decision of the prior panel, ruled that the autonomous decisions of the student editors in refusing to publish Petitioner's advertisements were not attributable to the LHS Respondents and that, as a result, Petitioner had not met his burden of proving the existence of state action. App. C at 107a. Judge Stahl, the sixth judge, who authored the prior panel's majority opinion, concurred in the *en banc* judgment. *Id.* at 139a. In so doing, Judge Stahl endorsed the immunity defenses raised by the LHS

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1. Petitioner named as individual defendants: the Superintendent of the Lexington Public Schools, the Principal of Lexington High School, the faculty advisors of the newspaper and Yearbook and the chairman and members of the Lexington School Committee. Petitioner did not sue the student editors. App. C at 121a.

Respondents under 42 U.S.C. § 1983, holding that: "defendants are entitled to judgment because they did not, under § 1983, ultimately cause the conduct of the non-party students." *Id.* at 143a.

A. The Yearbook And *Musket* Are Independent Student-Run Publications.

Editorial boards consisting entirely of students operate the Yearbook and the *Musket*, both of which are extracurricular activities. *Id.* at 108a-110a. The student editors make all of the editorial and operational decisions for their respective publications, including the policies and practices regarding advertisements. *Id.* The autonomy of the student editors is consistent with the dictates of Mass. Gen. L. c.71, § 82 (entitled "Rights of Students To Freedom of Expression").[2] *Id.* at 132a.

During the relevant time-frame, the majority of the Yearbook's advertising section consisted of congratulatory or commemorative ads purchased by students and their families. *Id.* at 108a-109a. A few advertisements were also sold to local businesses, which typically included congratulatory messages to the graduating class and involved businesses which the students frequented or had some relationship with during their high school years. *Id.* at 109a; Petitioner's Writ of Certiorari, at 9 (hereafter "Pet."). Similarly, advertising in the *Musket* was limited to local businesses that catered their services and/or goods

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2. Petitioner's contention that Respondents imposed "stringent restrictions" on what the *Musket* could print during a town referendum over the condom availability policy the year prior to the events surrounding the instant dispute is erroneous. Pet. at 6 n.1. As the District Court found, the record demonstrates that the students did not comply with the so-called restrictions and suffered no penalty for their conduct. App. A at 5a n.7.

to the students, such as SAT preparation courses, graduation rings, prom dresses, tuxedo rentals and pizza. App. C at 110a.

Both the Yearbook and the *Musket* had unwritten policies against accepting advertisements from political candidates (including student candidates), political organizations or advocacy groups. *Id.* at 109a-111a; Pet. at 10. Each publication uniformly enforced these policies and neither publication has ever printed a political or advocacy advertisement, or accepted an advertisement from a political or advocacy organization. App. C at 109a n.2; Pet. at 9-10.

Respondents Karen Mechem and Samuel Kafrissen were the faculty advisors to the Yearbook and the *Musket*, respectively. App. C at 108a-110a; Pet. at 9-10. Mechem's and Kafrissen's roles were strictly advisory in nature. App. C at 108a-110a; Pet at 9-10. Both served as resources to the students to facilitate publication of the Yearbook and the newspaper and neither possessed decision-making authority. Pet. at 8-9.

B. The Student Editors Of The Yearbook and *Musket* Independently Decide To Reject Yeo's Ads.

Petitioner Yeo submitted an advertisement advocating abstinence to the Yearbook on November 1, 1993. The ad stated: *"We know you can do it! ABSTINENCE: The Healthy Choice. Sponsored by: Lexington Parents Information Network (LEXNET)."* App. C at 112a; Pet. at 7. Consistent with standard operating procedures, Yeo's ad was not reviewed by the student editors until after the publisher returned the Yearbook's preliminary proofs in January 1994, at which time all of the advertisements were closely scrutinized by the students without Mechem's involvement. App. C at 112a; Pet. at 7. Deciding that the abstinence advertisement violated the Yearbook's policy against printing political or advocacy advertisements, the

students rejected Yeo's ad in the form it was submitted. App. C at 112a; Pet. at 10. The student editors decided that Yeo would be given the choice of revising his advertisement to conform with Yearbook policy or have his money refunded. App. C at 113a. The student editors made this decision without seeking or requesting the approval of Mechem or any other school official. *Id.* at 112a-113a.

The students asked that Mechem contact Yeo on their behalf. As requested, Mechem called Yeo on February 1, 1994, and conveyed the student editors' decisions. *Id.* at 113a; Pet. at 10. Yeo refused to revise the ad. App. C at 113a; Pet. at 10. Left with no choice, the student editors decided to reject the abstinence advertisement and to refund Yeo's money. App. C at 113a; Pet. at 11. At the students' request, Mechem wrote to Yeo on February 4, 1994, confirming the Yearbook's decision and refunding his money. App. C at 113a-114a; Pet. at 10-11.

On February 1, 1994, Yeo submitted to the *Musket* an ad which advocated sexual abstinence and, unlike the ad submitted to the Yearbook, encouraged LHS students to contact his newly-formed group, LEXNET, for "*[a]ccurate information on abstinence, safer sex and condoms*". App. C at 114a; Pet. at 8. The *Musket*'s student editors discussed Yeo's proposed ad and decided to reject it based on the newspaper's policy against printing political or advocacy advertisements. App. C at 114a-115a; Pet. at 11. The *Musket* student editors took this action without first notifying or seeking the approval of Kafrissen or any school administrator. App. C at 115a. The newspaper's student Business Manager notified Yeo of the decision by letter dated February 24, 1994. *Id.* at 114a-115a; Pet. at 11.

Upon receipt of the rejection notices from the *Musket* and the Yearbook student editors, Yeo and the Rutherford Institute,

an advocacy group retained by Petitioner, contacted various LHS school officials and threatened to sue unless the ads were printed. App. C at 115a. On March 1, 1994, the *Musket* student editors met to discuss the evolving controversy surrounding their decision not to publish the abstinence advertisement. *Id.* at 115a-116a. The student editors reaffirmed their decision to reject Yeo's ad and instead asked Kafrissen to serve as an intermediary to invite Yeo to write a letter-to-the-editor in which he could promote his "abstinence" position. *Id.*; Pet. at 11.

Yeo turned down the student's invitation by letter dated March 7, 1994, and once again threatened to take legal action. App. C at 117a. A few days after receipt of Plaintiff's March 7 letter, the entire *Musket* staff met to review the editors' decision not to print the abstinence advertisement. Neither Kafrissen nor any other school official were invited to attend this meeting. *Id.* at 118a. The *Musket* student staff voted to reject the ad. *Id.* at 116a-117a; Pet. at 12.

C. The Student Editors Affirm Their Decisions Not To Print The Ads.

Lexington's Superintendent convened a meeting with the Editors-In-Chief of the Yearbook and *Musket*, both faculty advisors and LHS' Assistant Vice Principal on March 18, 1994. App. C at 119a; Pet. at 12. Two members of the Lexington School Committee were also in attendance. App. C at 119a. The Superintendent and the School Committee members outlined the potentially serious legal consequences of the students' refusal to print Yeo's ads and suggested possible compromises for their consideration. *Id.* While affirming the students' independent right to decide, the school officials concluded the meeting by urging the staffs of each publication to further deliberate on the matter before making a final decision. *Id.* As a result of this meeting, the student editors were under

the impression that the school officials wanted them to print the advertisements. *Id.* at 118a; Pet. at 12.[3]

Shortly thereafter, the *Musket* Editor-In-Chief held a series of discussions with his student staff concerning the issues raised at the March 18 meeting. App. C at 119a. They also discussed a "counter-ad" submitted by a group of LHS students, which advocated "safe sex". *Id.* at 118a. The student staff decided to run neither the abstinence ad nor the safe sex ad based on their policy against accepting political or advocacy advertisements. *Id.* at 118a-119a.

Following the March 18, 1994 meeting, the Yearbook editors decided that they wanted to meet with Yeo and explore the possibility of reaching some form of compromise. *Id.* at 119a; Pet. at 12-13. The students once again asked Mechem to act as their "go-between" and invite Yeo to a meeting to investigate alternatives to printing the ad as originally submitted. App. C at 119a. Yeo rejected this overture. *Id.*; Pet. at 13.

As a result, the Yearbook's editorial board met to make a final decision. App. C at 120a. The students affirmed their earlier decision not to include the ad in the 1993-1994 edition of the Yearbook based on their policy against accepting political or

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3. The Petition misstates the record in suggesting that the decisions not to publish the ads were made "in accordance with the school's official condom policy." Pet. at 19. The record contains no factual connection between the school's condom policy and the actions of the student editors. To the contrary, it is undisputed that each publication's policy against printing political and/or advocacy advertisements pre-dated the advertising controversy with Yeo. Indeed, in reciting the facts, Petitioner appears to concede that the students' refusals to run the ads were made in accordance with each publications' undisputed policy not to print political and/or advocacy ads. *See* Pet. at 9-10.

advocacy advertisements. *Id.* The Co-Editors-In-Chief thereafter drafted a formal announcement on April 6, 1994, confirming the Yearbook's decision to reject the abstinence ad. *Id.* The Editor-in-Chief of the *Musket* reaffirmed the students' decision not to publish the advertisement in the newspaper shortly thereafter. *Id.* at 119a-120a.

REASONS FOR DENYING THE WRIT

There is no conflict between the First Circuit's *en banc* opinion, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) and *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991). Neither *Hazelwood* nor *Planned Parenthood* involve the issue of state action and are simply inapplicable to the question presented by the Petition. Indeed, the First Circuit's *en banc* opinion is consistent with the holding of every Court of Appeals that has considered the state action question in the analogous context of publications run by college and graduate students.

Even if the college/graduate student cases are distinguishable, as Petitioner argues, the Petition nevertheless fails to present compelling reasons for the granting of certiorari. To date, the First Circuit is the only appellate court to have addressed the state action issue specifically in the high school publication setting. This may be due to the unique set of circumstances of this case created, in part, by a state statute — Mass. Gen. L. c.71, § 82 — which granted the students editorial autonomy. A total of only five other states have adopted a similar law. Thus, even if the Court's inquiry focused exclusively on the high school setting as Petitioner urges, the issues raised by the Petition are not currently widespread and are unlikely to become widespread.

Finally, in addition to Petitioner's inability to prove the existence of state action, his claims suffer from other legal

deficiencies. Petitioner cannot meet his burden of proving that the advertising sections of the student publications were public fora. Nor has Petitioner addressed, let alone challenged, Judge Stahl's concurring opinion that Petitioner is unable to prove municipal or individual liability under 42 U.S.C. § 1983.

I.

THE FIRST CIRCUIT'S *EN BANC* DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT OR WITH ANY APPELLATE DECISION.

A. *Hazelwood Sch. Dist. v. Kuhlmeier* Does Not Apply to the State Action Issue Presented by This Case.

Petitioner divines a state action test for secondary schools out of this Court's decision in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), and alleges that the First Circuit's *en banc* decision "conflicts in principle" with this test. *Hazelwood*, however, is a public forum case which does not address, either directly or indirectly, the question of state action. Indeed, the words "state action" never appear in the *Hazelwood* opinion. Nor, for that matter, is the state action issue ever referred to in either of the decisions of the lower courts in *Hazelwood*. *See, e.g.*, 607 F. Supp. 1450 (E.D. Mo. 1985) and 795 F.2d 1368 (8th Cir. 1986).

Moreover, this Court has never cited *Hazelwood* in the state action context. The Courts of Appeals have also limited their application of *Hazelwood* to its four corners.[4] As a result,

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4. *See, e.g., Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Educ.*, 42 F.3d 719, 722-723 (2d Cir. 1994), *cert. denied*, 515 U.S. 1160 (1995); *Brody by and through Sugzdinis v. Spang*, 957 F.2d 1108, 1118-1120 (3d Cir. 1992); *Bishop v. Aronov*, 926 F.2d 1066, (Cont'd)

Petitioner is unable to cite to a single case that supports his interpretation of *Hazelwood* or that even arguably applies the language in *Hazelwood* to a state action question.

The issue in *Hazelwood* was whether the principal of a public high school violated the First Amendment rights of students when censoring several articles prepared by the students for a newspaper, which was produced as part of the school's journalism curriculum. The undisputed affirmative conduct of the principal — a school official — was the source of the alleged First Amendment violations. There is no suggestion in *Hazelwood* that the students played any role in restricting the speech at issue, which is the defining characteristic of the present case, but merely that students were aggrieved by the speech restrictions imposed by a school official.

In arguing that there is a "conflict in principle," Petitioner relies on the discussion in *Hazelwood* regarding

> educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents and members of the public might reasonably perceive to bear the imprimatur of the school.

Hazelwood, 484 U.S. at 271. Petitioner argues that since the LHS publications are school sponsored and might reasonably be perceived to bear the imprimatur of the school, the decisions by the student editors to reject his advertisements must be attributed to the school officials and thus treated as state action

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(Cont'd)
1071 (11th Cir. 1991), *cert. denied*, 505 U.S. 1218 (1992); *Poling v. Murphy*, 872 F.2d 757, 762-763 (6th Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990); *Burch v. Barker*, 861 F.2d 1149, 1158 (9th Cir. 1988).

under the First Amendment. According to the logic of this argument, the First Circuit's *en banc* decision conflicts with this *Hazelwood* principle.

Petitioner's argument fundamentally misconstrues the *Hazelwood* decision. After concluding that the student newspaper at issue in that case was a non-public forum, *id.* at 267-270, this Court considered how to balance the First Amendment freedom of speech rights of the students against the authority of the school to impose valid educational regulations. *Id.* at 270-271. In striking this balance, the Court ruled that the First Amendment requirement to tolerate certain student speech does not "require a school affirmatively to promote particular student speech," *id.* at 271-272, and that schools "may refuse to lend [their] name[s] and resources to the dissemination of student expression," *id.* at 272-273, in school-sponsored publications that "students, parents and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271. Thus, *Hazelwood's* "imprimatur" language arises out of this Court's attempt to define the parameters in which a high school may "disassociate itself" from student speech without violating the students' First Amendment rights and is wholly unrelated to the state action doctrine.

Even assuming *arguendo* that *Hazelwood* created a new state action analysis for school sponsored publications, the facts in *Hazelwood* are so dissimilar from those presented in the Petition that no conflict in principle could arise. In *Hazelwood*, the newspaper was produced as part of the school's curriculum. It was written by students in the school's Journalism II class. The teacher of the class selected the editors, scheduled publication dates, assigned stories, reviewed and edited the content and was the final authority with respect to almost every aspect of the production and publication of the newspaper. During the semester in question, it was the school's practice for the teacher to submit page proofs to the school's principal for

his review prior to publication. It was upon such review that the principal objected to two student articles based on their content and unilaterally removed the pages containing the offending articles from the published edition. *Id.* at 262, 267-268. The student authors then filed suit pursuant to 42 U.S.C. § 1983, alleging that the editing of their articles violated the First Amendment.

In contrast, the LHS Yearbook and *Musket* are entirely student-run, extracurricular activities operating independently of the school's authorities.[5] Yeo, unlike the plaintiffs in *Hazelwood*, is not a student. The decisions not to publish Yeo's ads were made solely by the student editors of the respective publications, without any participation, or coercion by, school officials. The record is clear that while the LHS school officials might have decided the matter differently, they refrained from interfering with the students' decisions pursuant to Mass. Gen. L. c.71, § 82, which promotes the students' editorial autonomy from school officials.[6] App. C at 136a.

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5. Petitioner seeks to dismiss the fact of the students' editorial autonomy in running the two publications by emphasizing their receipt of financial support from the school and the principal's custodial role over their bank accounts. It is well-settled, however, that "receipt of public funds does not make the [challenged] decisions acts of the State." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). Moreover, there is no record evidence of school officials taking action financially with regard to the publications that could in any way be related to the particular decisions at issue. The mere speculative potential that the principal could abuse his power over the "purse-strings" is of no consequence to the state action analysis. *See Rendell-Baker v. Kohn*, 641 F.2d 14, 24-5 (1st Cir. 1981), *aff'd*, 457 U.S. 830 (1982) (latent power to control by cutting off funding does not create state action).

6. To the extent that Lexington public officials *could* have intervened in the decisions regarding Petitioner's ads, their choice

(Cont'd)

B. The First Circuit's *En Banc* Decision Does Not Conflict With *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*

Petitioner's assertion that the First Circuit's *en banc* decision conflicts "in principle" with *Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991), falters for the same reason that the suggested conflict with *Hazelwood* fails. *Planned Parenthood* does not address the issue of state action. It focuses instead on the application of the public forum doctrine to high school publications. As in *Hazelwood*, no question was raised about state action because public school officials were the ones who specifically took the challenged action — *i.e.*, refusing to publish Planned Parenthood's advertisements in various student newspapers, yearbooks and athletic programs — and they did so pursuant to the school district's advertising guidelines. *Planned Parenthood*, 941 F.2d at 819-821. In contrast to the instant case, the student staffs in *Planned Parenthood* were excluded from, and had no role in, the promulgation of the advertising guidelines or the decisions to reject the disputed

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(Cont'd)
to allow the students to make the decisions reflects the type of educational policy decision that *Hazelwood* expressly recognizes is better left to local school authorities, rather than the courts. *Hazelwood*, 484 U.S. at 273. In fact, the implicit argument Petitioner is making is that the LHS school officials were *required* to intervene and take the decision whether to publish the ads out of the students' hands. This argument turns the rationale of *Hazelwood* on its head. *Hazelwood* recognizes the importance of allowing local and state school authorities wide discretion to decide what type of restrictions on speech, if any, are appropriate. *Hazelwood* cannot be used, as Petitioner seems to be attempting to do, to require that school officials assume direct responsibility for generating and enforcing advertising restrictions when they have made the educational judgment that such restrictions would not be appropriate.

ads. Since the school officials, rather than the students, controlled the decisions not to publish the advertisements, the *Planned Parenthood* decision cannot fairly be compared to the instant case for purposes of the state action inquiry.

C. The First Circuit's *En Banc* Decision is Consistent With the Courts of Appeals Decisions That Have Considered State Action in the Context of Student Publications.

The First Circuit's *en banc* decision is consistent with the appellate cases that have decided the state action issue in the analogous context of college and graduate school student publications. Each of these appellate decisions have examined student-controlled editorial decisions, including the rejection of advertisements, and have uniformly found no state action.

In *Sinn v. The Daily Nebraskan*, 829 F.2d 662 (8th Cir. 1987), for example, the Eighth Circuit Court of Appeals ruled that state action was not present when the staff of a college newspaper decided not to print advertisements identifying the sexual orientation of the would-be advertisers. The court ruled that since the student editors were editorially independent, they did not act as agents for the state when they rejected the disputed advertisements, notwithstanding their receipt of state subsidies, their use of the college's facilities and other public support. *Sinn*, 829 F.2d at 664. In so holding, the court stated:

> [W]e do not believe that the applicable Supreme Court guidelines mandate a finding of state action in a situation such as the one before us, where state control, or bare potential for control, is so attenuated and even speculative.

Id. at 665.

Similarly, in *Leeds v. Meltz*, 85 F.3d 51 (2d Cir. 1996), the Second Circuit Court of Appeals ruled that state action was not present when the student staff of a public university law school newspaper refused to print an advertisement of another student which solicited information to sue school officials for discrimination. In *Leeds*, not unlike the instant case, the would-be advertiser alleged that the school violated his "[c]onstitutional rights by failing to exercise sufficient control over the newspaper so as to assure that [the advertiser's] rights were not violated." *Id.* at 53. The Second Circuit rejected this theory and held that the burden rested squarely with plaintiff to prove that the school actually controlled the editorial decisions of the student editors in order to establish state action. Finding that plaintiff would not be able to satisfy this burden, the court upheld the dismissal of the Complaint. *See also Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073, 1075 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977) (refusal of student-run college newspaper to print the advertisement of a gay organization did not constitute state action); *Avins v. Rutgers, State Univ. of New Jersey*, 385 F.2d 151, 153-54 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968) (student law review editors possessed the editorial discretion and authority to reject an article notwithstanding the financial support received from the University). *But see Lee v. Board of Regents*, 441 F.2d 1257 (7th Cir. 1971) (defendants conceded conduct of college newspaper constituted state action).

II.

THIS CASE DOES NOT INVOLVE ISSUES THAT ARE WIDESPREAD OR THAT ARE LIKELY TO RECUR.

Assuming *arguendo* that the college/graduate student cases cited above are distinguishable, as Yeo argues,[7] the Petition

7. Petitioner argues that because the student editors making the decisions at issue in these cases were college and graduate (Cont'd)

nevertheless fails to present compelling reasons for the granting of certiorari. Even as posited by Yeo, the Petition does not involve an issue over which the lower courts are grappling or over which they have been unable to reach a consensus. To the contrary, the First Circuit is the only Court of Appeals to have ever addressed the state action issue in the specific context of student-run high school publications. Petitioner cannot identify a single other appellate ruling or pending case that raises the state action issue in the same context. The literal absence of judicial activity in this narrow arena demonstrates that there is no compelling reason to grant certiorari in this case. *See, e.g.*, Supreme Court Rule 10(a)-(c) (listing compelling reasons for granting of a writ of certiorari).

Nor does limiting the focus of the Petition to the high school setting, as Yeo urges, present the Court with an issue that is likely to recur with any frequency. One of the unique factual circumstances in this case is the existence of a state statute — Mass. Gen. L. c.71, § 82 — that influenced the conduct of the LHS school officials. This statute "express[es] Massachusetts' policy judgment that student editors of high school publications generally have editorial autonomy from school officials . . ." App. C at 132a. As a factual matter, this statute deprived the LHS officials of actual or effective control over the decisions of the student editors in their conflict with Petitioner.

(Cont'd)
students, as opposed to high school students, the decisions are distinguishable from the present case. There is no indication in any of the decisions, however, that the age of the students was a factor in determining whether state action was present. The state action analysis in all of these cases boiled down to determining whether it was the school authorities or the students who were the decision makers. There simply is no Supreme Court or appellate authority for Petitioner's assertion that a separate state action analysis is applicable to student editors of high school publications or that the state action analysis turns on the age of the student editors involved.

Massachusetts is only one of six states to have adopted such a statute,[8] meaning that the editorial freedom enjoyed by the LHS student editors simply is not widespread.

The one-sided nature of the factual record further bolsters the uniqueness of this case. Petitioner has conceded, for example, that the Yearbook and *Musket* were each bound by unwritten advertising policies prohibiting publication of political and/or advocacy advertisements and that these policies pre-dated the instant controversy. Petitioner further conceded that he has no knowledge about the decisionmaking processes that led to the rejection of his advertisements, meaning that he lacks any factual basis to challenge the students' testimony that they independently made all of the editorial decisions and that the decisions were made in conformity with each publication's advertising policy. App. C at 121a. This record, therefore, involves unique factual circumstances that are unlikely to recur.

III.

PETITIONER'S CLAIMS ARE LEGALLY DEFECTIVE.

A. The First Circuit Correctly Held That State Action Did Not Exist.

As this Court has observed, the state action inquiry is "necessarily fact-bound." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982). In this case, the First Circuit *en banc* unanimously ruled that the record demonstrated that the LHS school officials did not compel or influence the student editors' decisions to reject the abstinence ads. Indeed, the First Circuit

8. The other states are Arkansas, California, Colorado, Iowa and Kansas. *See, e.g.*, Ark. Stat. Ann. § 6-18-1201-1204; Calif. Educ. Code § 48907; Colo. Rev. Stat. § 22-1-120; Iowa Code § 280.22; and Kan. Stat. Ann. § 72-1504-72-1506.

found as a factual matter that the relationship between the student editors and the school officials was at times "close to adversarial" and that "the [school] officials might themselves, as they told the students, have made a different decision [with respect to Yeo's ads.]." App. C at 136a. Under these circumstances, the court properly held that Yeo had not meet his burden of proving that the independent conduct of the student editors was fairly attributable to the state. *Cf. Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981) (noting the adversarial relationship between public defenders and the state and holding that the state's payment of public defenders' salaries did not create state action).

B. The Yearbook's And *Musket's* Advertising Sections Were Not Public Fora.

Nevertheless, even assuming that state action existed, Petitioner's claims are futile since he cannot establish that the advertising sections were public fora to which he had a right of access. Indeed, if *Hazelwood* controls the state action analysis, then it would logically apply to the public forum analysis as well. *Hazelwood's* holding compels a finding that the school reserved the advertising sections of the *Musket* and the Yearbook as non-public fora. *See Planned Parenthood*, 941 F.2d at 829-30 (citing *Hazelwood* in support of the holding that the advertising sections of high school publications did not constitute designated public fora).

Chief Judge Torruella submitted a concurring opinion in the instant case to address this very point. As the Chief Judge observed:

> [I]t is simply not true, as a matter of constitutional law, that each time a state actor solicits advertising, a designated public forum has been created by the government.

App. C at 138a (citing *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974)). This Court has instead held that the government can create a public forum only by intentionally opening a non-traditional forum for public discourse. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802-04 (1985). In this case, it is undisputed that Petitioner's ads were rejected pursuant to unwritten policies that pre-dated the instant dispute and which express the students' intent to keep the advertising sections closed to political and/or advocacy advertising. These policies were both reasonable and viewpoint neutral.[9] The basis for the *Musket*'s and the Yearbook's denial of the sexual abstinence ads — their ban on political and ideological advertisements — has repeatedly been endorsed as a valid viewpoint neutral means of limiting speech in a non-public forum. *See, e.g., Lehman*, 418 U.S. at 304; *Cornelius*, 473 U.S. at 806; *Families Achieving Independence and Respect v. Nebraska Dept. of Social Serv.*, 111 F.3d 1408, 1420-1422 (8th Cir. 1997); *Brown v. Palmer*, 944 F.2d 732, 737 (10th Cir. 1991).[10]

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9. The "counter-ad" proposed by LHS students in response to Plaintiff's abstinence ads was also rejected by the student editors. App. C at 118a. In addition, the Petitioner could not point to any other edition of the *Musket* or the Yearbook which contained a political or advocacy advertisement.

10. Even if the advertising sections of the Yearbook and *Musket* constituted limited public fora, the students did not have a continuing obligation to keep them open. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("a state is not required to indefinitely retain the open character of the facility"). In this case, both publications adopted written guidelines in the 1994-1995 school year that clearly and unequivocally closed the advertising fora. App. C at 120a-131a.

C. Petitioner's Claims Are Futile Since Respondents Are Immune From Suit Under § 1983.

As Judge Stahl noted in his concurring opinion, it is not necessary to reach the state action or public forum questions since the LHS Respondents would nonetheless be immune from suit under 42 U.S.C. § 1983. Petitioner does not address in his Petition, let alone challenge, Judge Stahl's alternative basis for granting summary judgment in favor of Respondents. Indeed, at no stage in these proceedings has Petitioner ever opposed the § 1983 defenses proffered by Respondents, making his attempts to pursue this case futile.

CONCLUSION

For the reasons stated above, the Respondents respectfully request that the Petition for Certiorari be denied.

Respectfully submitted,

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